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No. _____

In The

Supreme Court of the United States

October Term, 1993

APHRODITE E. KARATINOS and
NICHOLAS E. KARATINOS,

Petitioners,

v.

TOWN OF JUNO BEACH, FLORIDA,

Respondent.

Petition For Writ Of Certiorari
To The District Court Of Appeal
Of The State Of Florida Fourth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where property owners are required to exhaust administrative remedies before both a municipality and a state agency prior to recovery of damages for rejection of a development plan, if the property owners ultimately obtain compensation for a permanent taking because of the State's regulation, is a municipality liable for temporary damages for the period that its zoning ordinance barred commencement of the necessary State administrative proceedings and at the same time prevented any economic use of the property?

2. Whether the Court should resolve the conflict in decisions of the lower courts and respond to their stated uncertainty as to when a regulation goes too far in a takings case and causes economic injuries which are disproportionately concentrated on the property owners?

PARTIES INVOLVED

Other than Petitioners and Respondent, the only other party to this case was the State of Florida, Department of Natural Resources which, shortly prior to the trial before the Circuit Court, purchased the subject property and was dismissed from this case.

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PETITION FOR WRIT OF CERTIORARI

Aphrodite E. Karatinos and Nicholas E. Karatinos, by their undersigned attorney, petition the Court to issue a writ of certiorari to review the decision of the District Court of Appeal Fourth District of the State of Florida in this case.

OPINIONS BELOW

This action was originally filed in 1983 in the Circuit Court of the Fifteenth Judicial Circuit of Florida seeking damages in inverse condemnation against the State of

Florida Department of Natural Resources [DNR] and seeking declaratory relief and damages for a temporary taking pursuant to 42 U.S.C. Sec. 1983 from the Town of Juno Beach (Juno). App. F, *infra*, 22-35. Shortly before trial the DNR purchased the subject property and was dismissed from the case. The case against Juno went to trial on the Amended Supplemental Complaint before the court without a jury on the issue of whether there had been a temporary taking. The issue of damages was reserved for a jury trial at a later date in the event that the court found a taking. The trial court entered its final judgment in favor of the defendant Juno on January 7, 1992. App. B *infra*, 7-14. The decision of the Fourth District Court of Appeal, which is reported at 621 So.2d 469 (Fla. 4th DCA 1993), App. A, *infra*, 1-4, was entered on April 14, 1993 affirming the final judgment of the trial court. The District Court of Appeal denied a timely petition for rehearing on August 11, 1993, Anstead, J. concurring specially with opinion. App. A, *infra*, 4-6. Thereafter, on January 21, 1994, the Supreme Court of Florida denied a petition for review. App. C, *infra*, 15-16.

JURISDICTION

The jurisdiction of this Court is invoked as this case involves the construction and application by the trial and appellate courts of the State of Florida of U.S. Constitutional provisions, and the federal statutory provisions of 42 U.S.C. Sec. 1983. The Fifth Amendment protection against the taking of private property for public use, without just compensation, applies against the States through the Fourteenth Amendment. See, *MacDonald*,

Sommer & Frates v. Yolo County, 477 U.S. 340, 342 n.1 (1986).

CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution, 42 U.S.C. Sec. 1983 (1988), selected provisions of Chapter 161 Florida Statutes (1979), Section 16B-33.08(1)(c) of the Florida Administrative Code, and Section 5.120 of the Zoning Code of the Town of Juno Beach (1979). Pertinent portions of these provisions are reprinted and attached hereto at Appendix G.

STATEMENT

1. Petitioner Aphrodite E. Karatinos, and her husband Emanuel, who has since passed away, purchased on February 25, 1958 unimproved oceanfront property in Juno in fee simple absolute, intending to develop in order to provide income during their retirement. Mr. Karatinos died in 1973 after a long struggle with cancer, prior to his being able to develop the property. In 1976 Mrs. Karatinos conveyed a one-half interest in the property to her son, Petitioner Nicholas E. Karatinos, and they continued to own the property in fee simple absolute until the fall of 1991 when it was purchased by the State of Florida in partial settlement of the instant litigation.

In 1958, permits to improve were available from the Town of Juno Beach, Florida, subject to a 50-foot setback from the mean high-water line. In 1964 Juno established

its RM-2 Residential Moderate Density zoning on properties in the northern half of Juno (including the Karatinos property) which allows up to 12 multifamily units per acre. The Karatinos property is almost an acre in size. The property has 209 feet of oceanfront and the western border (abutting state road A1A) is approximately 200 feet from the water's edge. Juno has allowed multi-family structures to be built on similar beachfront properties south of the Petitioners' property in the same RM-2 zoning district.

Pursuant to Section 161.041 Florida Statutes (1979), the Department of Natural Resources (DNR) posesses exclusive right to issue permits on oceanfront property in the State of Florida. Section 161.053(2) Florida Statutes (1979) requires the establishment of "coastal construction control lines [CCCL] . . . by the department [DNR] . . . for the protection of upland properties and the control of beach erosion." DNR established the CCCL in Juno in 1979. The line runs through the Karatinos property, parallel to the ocean, approximately 20 feet east of its western border. Shortly thereafter, in 1979 Juno enacted Section 5.120 of its zoning ordinance which established a setback line, 50 feet to the west of the CCCL, entirely landward of and off of the Karatinos property. Section 5.120 states in applicable part:

> b. No wall, fence or other structure shall be erected easterly of a point fifty (50) west of the Coastal Construction Control Line except as otherwise permitted by this section.
>
> c. Modifications to sections . . . 5.120b may be granted only by the Town Commission.

> Prior to hearing by the Town Commission the following conditions shall be met;
>
> (1) Approval of the requested modification by the Florida Bureau of Beaches and Shores [DNR]; . . .

The Bureau of Beaches and Shores is a part of the DNR. Section 161.053(4)(b) Florida Statutes (1979) does not allow the DNR to " . . . contravene setback requirements, or zoning, or building codes, established by a county or municipality which are equal to, or more strict than those requirements provided herein." Rule 16B-33.08(1)(c) Florida Administrative Code provides that an application for a permit from the DNR must contain " . . . written evidence, provided by the appropriate local governmental agency having jurisdiction over the activity, that the proposed activity as submitted to the bureau [Bureau of Beaches and Shores] does not contravene local setback requirements or zoning or building codes." Thus, Juno's requirement of prior DNR, Beaches and Shores approval inherently conflicts with the State's statutory and regulatory requirement of prior local approval.

The Karatinos began development activities in the summer of 1980 seeking to build two 3,500 square foot residences on their property. This is a very modest project in view of the property's size (almost an acre) and the fact that the RM-2 zoning allows up to 12 units per acre. Oceanfront property owners in Juno immediately south of the Karatinos property built high density multi-family, multi-story buildings to take full advantage of the RM-2 zoning. An architect was retained to press for project approval and complied with all of Juno's demands during

the application process. At Juno's request, he submitted an application for site plan approval together with drawings which showed the exact placement of the project on the property. The site plan was presented by the architect at a Planning and Zoning Commission regular meeting chaired by Zoning Commissioner Don Durnell, and following that at a City Commission workshop. Planning and Zoning recommended disapproval because the project failed to comply with ordinance 5.120. App. F, *infra*, 25. Although not specifically noted by Planning and Zoning, the provisions not complied with were the 50 foot setback line and prior approval from Beaches and Shores [DNR]. Then, on January 13, 1982, the architect presented the project to the Juno Town Commission, Juno's highest legislative body, which followed the recommendation of Planning and Zoning and denied site plan approval.

Petitioners did not file suit against Juno at this time because in order to obtain a modification of its 50 foot setback requirement ordinance 5.120 required approval of DNR (Beaches and Shores). Accordingly, Petitioners' experts submitted a project application to the DNR seeking project approval. DNR refused to accept the project application, relying upon the statute [Sec. 161.053(4)(b) Florida Statutes (1979)] and regulations [Sec. 16B-33.08(1)(c), Florida Administrative Code] which require prior project approval from a local jurisdiction. The Karatinos appealed to the Governor, who, with the Cabinet, collectively constitute the head of DNR, seeking a waiver from this requirement, but were refused. Thus, Juno's application of its zoning ordinance created a classic "Catch-22" as neither Juno's ordinance nor the State's requirements could be satisfied. App. A, *infra*, 3.

Following DNR's refusal, the architect returned to Juno and sought a waiver from the provision of ordinance 5.120 from Juno's Zoning Commissioner, Don Durnell, who had chaired Juno's Planning and Zoning Commission which had reviewed the project in December 1981. By letter of October 27, 1982, Mr. Durnell refused to provide a statement of no objection to the project. The architect again sought project approval from Juno, or in the alternative, Juno's final determination. By letter of November 15, 1982, (App. D, *infra*, 17) Mr. Durnell stated:

> After our meeting on November 5, 1982, I requested an opinion from the Town attorney regarding my letter to you dated October 27, 1982. Mr. Adams opinion is that the Juno Beach Commissioners denial of the Karatinos request on January 13, 1982 *is final* and not subject to appeal. . . . [Emphasis supplied]

Their modest project rejected by both Juno and by the State, in 1983 the Karatinos filed the instant lawsuit naming both Juno and the State of Florida, seeking declaratory relief from zoning ordinance 5.120 and damages. Their complaint, App. F, *infra*, 22-35, alleged violation of federal Constitutional provisions, *Id.* at 29 and 31, and of 42 U.S.C. Sec. 1983, *Id.* at 30.

Due to the cost of construction and the heavy burden of exhausting all administrative remedies before Juno and the State, the two-home project was no longer financially viable. The project was upgraded to 6 residential units which were still well within RM-2 density. The architect submitted detailed construction plans to Juno which would be sufficient to allow a contractor to bid the project and build it.

The provisions of ordinance 5.120 remained in effect in 1983, 1984 and 1985 which barred the filing of a project application with the State, DNR. In addition, Juno's Comprehensive Plan which showed the Karatinos property as recreation and open space conflicted with Juno's RM-2 zoning of the property which allowed up to 12 units per acre. App. F, *infra*, 24-25. This conflict had been created by Juno's own action in June 1979 when Juno had enacted its Comprehensive Plan. Despite written protests to Juno and meeting with Juno officials by the Karatinos zoning attorney and architect in the period July through November 1984, Juno refused to correct this self-created impediment and insisted that the Karatinos petition to change the Comprehensive Plan so that it would conform to Juno's zoning map, which they did.

On December 12, 1984, Juno's planning consultant issued his report acknowledging the conflict between the Comprehensive Plan and the zoning ordinance. With a trial date approaching, on March 6, 1985 Juno held a public hearing on the issue of changing the Comprehensive Plan to conform to the RM-2 zoning. The Plan was amended by Juno on May 8, 1985 to correct the inconsistency. On May 20, 1985, Planning and Zoning recommended denial of Petitioners' six unit project. On June 3, 1985, Petitioners' architect was required by Juno to file an application for "special exception/variance" prior to consideration of the project by the Town Commission. The Karatinos were seeking to build residences which were squarely within the intent of the RM-2, moderate density residential zoning. They were not seeking to build a church or a gas station which would require a special exception. Only a modification of ordinance 5.120's 50

foot setback line and waiver of the requirement of prior DNR approval were essential from Juno which would allow the State permit process to begin. Despite this, Petitioners continued to follow Juno's instructions in the applications process. The form was submitted, following which a public hearing was held before the Town Commission on June 10, 1985. The Town Commission surprised Petitioners by issuing a resolution allowing two units rather than the six units requested. Petitioners' architect and attorney protested the proposed reduction to two units as the zoning clearly allowed six units, the lesser project was no longer financially feasible, and there was no application pending for two units. Despite Petitioners' objections, at a public hearing on August 14, 1985, the Town Commission approved two units.

At trial in 1991, Petitioners' experts, including an engineer, a coastal engineer, an architect, a contractor and construction estimator, and an appraiser together demonstrated that a two unit structure built in accordance with DNR requirements would not have been economically feasible in 1985, 1987, or in 1991. App. B, *infra*, 9-10. Juno offered no expert testimony in rebuttal. Mr. Karatinos testified that the two-home project was marginally economically feasible in 1982.

Juno rejected the six unit project despite its meeting Juno's RM-2 moderate density residential zoning requirements. On September 17, 1985, Juno by letter transmitted its Resolution 85-10 (App. E, *infra*, 18-21) to the DNR expressing the Commission's opposition to any construction on the Karatinos property, and urging the State to defend its Coastal Construction Control Line. *Id.* at 18.

Juno's Resolution belied its indicated approval of two units which is not mentioned in the Resolution. The Resolution itself states, inter alia, that Juno " . . . granted a special exception and modification to the [Juno] setback line . . . only because of the existing litigation and the Town's lack of financial resources to defend said litigation and to purchase said property should inverse condemnation be granted." *Id.* at 20.

2. The DNR after numerous submissions by Petitioners' experts beginning in the fall of 1985 finally on March 13, 1986 acknowledged that the application for a permit was complete. On May 20, 1986, the Governor and Cabinet, sitting as head of DNR, affirmed the staff recommendation and disapproved the application based upon environmental considerations. A timely appeal was filed and a hearing was held before a State Hearing Officer in October 1986 who, on February 19, 1987, issued recommended Findings of Fact and Conclusions of Law affirming the decision of the Governor and Cabinet. On May 1, 1987, the Governor and Cabinet adopted his findings and finally denied the application on environmental grounds. App. F, *infra*, 26-27.

Trial activity, which had been abated pending a final administrative determination, resumed. The DNR filed a motion for summary judgment and supporting affidavit of Alfred Devereaux, then Chief of the Bureau of Beaches and Shores of the DNR, who stated that it might be possible for the DNR to approve a structure cantilevered over the CCCL on the Karatinos property. This showed that the DNR had not foreclosed approval of a residential structure on the Karatinos property. Mr. Devereaux's sworn statement was contradicted at trial by Ralph Clark,

a DNR coastal engineer, who testified that DNR would never have permitted any building seaward of the Coastal Construction Control Line on the Karatinos property. It was not until August 31, 1991 that the DNR, through its attorney, wrote Petitioners acknowledging that the DNR had determined that it would not allow any residential structure on the Karatinos property. Shortly thereafter, the DNR purchased the Karatinos property and was dismissed from the case.

3. The matter was litigated before the trial court seeking damages from Juno for a temporary taking pursuant to 42 U.S.C. Sec. 1983 and federal Constitutional provisions. App. A, *infra*, 2, 5. The trial court held that Petitioners had exhausted their administrative remedies before Juno and thus reached the merits of the "taking" claim. App. B, *infra*, 11. Standing at the end of the administrative process, the Court found " . . . that there was no possible way that the Plaintiffs were ever going to get approval from the State to build inside the coastal construction control line." *Id.* at 10. The court determined that the project was " . . . doomed, regardless of the Town's actions." *Id.* at 10. The Court held it unessential to determine whether Juno had misapplied its administrative procedures in insisting upon either a modification or a variance in consideration of Petitioners' projects, and did not reach the issue of Juno's down-zoning of the property to two units as the number of units did not matter in view of the factual holding that Petitioners " . . . stood no chance of getting State approval." *Id.* at 11. Finally, the Court held that Juno's error on its land use maps *vis a vis* the zoning ordinance ("recreational" versus RM-2) did not result in a denial of property rights as Juno

took adequate steps to correct its error, and that despite its "recreational" designation of the property, Juno did not seek it as such. *Id.* at 11. The Court denied the request for damages, stating:

> Section 5.120(b) of the Town's Ordinances (50' setback) is not an improper or unlawful exercise of the Town's police power. This regulation is not so onerous that it in effect appropriates the property. It had no known diminution in the investment-profit contemplated (since the D.N.R. killed all Plaintiffs' plans). The fact that the Plaintiffs' property is entirely inside the setback, is not dispositive. There is a variance or modification procedure and the regulation when viewed in light of its purpose, its generic effect and economic impact, is not an invalid exercise of police power. *E.g., Williamson Co. Regional Planning v. Hamilton Bank,* 105 S. Ct. 3108 (1985), *Glisson v. Alachua County,* 558 So. 2d 1030 (Fla. 1 D.C.A. 1990), *McNulty v. Town of Indialantic* (sic), 727 F.Supp. 604 (M.D. Fla. 1989). *Id.* at 13.

Thus, the trial court rejected the federal Constitutional and federal statutory matters presented to it.

4. All of the federal Constitutional and federal statutory matters presented to the trial court were raised again to the appellate tribunal which affirmed the lower court, acknowledging that the Karatinos were caught in "a classic Catch-22" between Juno and the State, App. A, *infra,* 2-3, but noting, inter alia:

> In 1991 DNR purchased the Karatinos' property, but the Karatinos continued their claim against the town, claiming they were improperly deprived of all use of their property by the town from 1982, when the town first turned their

> project down, to 1985, when the town approved two units. The town denied that it did anything improper and, in the alternative, argued that if its actions were improper they were not the cause of the Karatinos' damages. We agree with the town's alternative argument and therefore need not decide whether it acted properly. *Id.* at 4.

The Appellate Court accepted the lower court's factual finding that Petitioners would never have gotten approval from DNR to build seaward of the Coastal Construction Control Line and that accordingly the project " . . . was doomed, regardless of the Town's action." *Id.* at 4. The Court acknowledged that since DNR did not purchase the property until 1991, there was a possibility that DNR would have approved their project during 1982 to 1985. *Id.* at 4. The Court concluded, "[W]hile this may have been a possibility, it cannot be the basis to reverse findings of fact supported by competent evidence that DNR would never have allowed anything to be built on the property." *Id.* at 4.

Petitioners' motion for rehearing was denied, Anstead, J., concurring specially. Judge Anstead termed Juno's insistence upon applying its ordinance provision to the property requiring prior state approval in the period January 1982 through September 1985 a " . . . snafu that was eventually worked out." *Id.* at 6. He finds ". . . no doubt that the town's ordinance and action delayed the owners' attempt to get a final answer to their request to develop." *Id.* at 5. Judge Anstead stated further:

> . . . I would place this delay more in the category of the "normal delays" created by the myriad of governmental procedures mentioned by the Supreme Court in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 . . . , as *not* giving rise to a temporary taking or entitlement to compensation. Obviously, not every delay in the development process attributable to the government results in a "temporary taking". This is true even where the delay is the "fault" of the government. *Id.* at 5-6.

5. The Supreme Court of the State of Florida denied Petitioners' Request for Review on January 21, 1994. App. C, *infra*, 15.

REASONS FOR GRANTING THE PETITION

The factual finding by the Trial Court was that Petitioners' project was "doomed" because of the State Coastal Construction Control Line (CCCL). App. B, *infra*, 10. Because of that, Petitioners ultimately received permanent taking damages in a settlement with the State. *Id.* at 9. The Town of Juno Beach denied the Petitioners' application for project approval in January, 1982 but the State, DNR did not finally deny Petitioners' application until May, 1987. Under established precedent in Florida, *Vatalaro v. Dept. of Environmental Regulation*, 601 So.2d 1223 (Fla. 5th DCA 1992), the actual "taking" did not occur until Petitioners had exhausted their administrative remedies before the Town and the State by getting a final order from the Governor and Cabinet of the State of Florida on May 1, 1987, following specific findings of fact

in a State administrative hearing. In *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992) it was held that the mere possibility that a permit could be awarded was sufficient to require exhaustion of all administrative remedies. The holding that Petitioners suffered no damage from the Town's denial because they were never going to get a permit from DNR, conflicts with the holdings that a taking does not occur until denial of the landowners' permit application. The decision in this case rolls back the effect of the DNR taking to a much earlier date.

In deciding this case on the facts alone the lower Courts have overlooked the application not only of *Lucas* and *Vatalaro,* but also *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987) in which this Court held that a property owner is entitled to compensation where a regulation, even though temporary, deprives the property owner of all beneficial use of its property. Juno's ordinance 5.120, of course, deprived the property owners of all beneficial use of this property, absent a modification, but inherent within the ordinance itself was a bar to Petitioners ever obtaining a modification because of the "Catch 22" the ordinance created with the State regulation. Petitioners in this case are entitled to compensation because the municipal ordinance made it impossible for the Petitioners to even seek permanent taking damages from the State at any time prior to the time when the Town finally permitted the Petitioners to complete their application for the State permit.

As set forth *infra,* at pp. 22-25, the U.S. Courts of Appeals and the Florida courts have stated their uncertainty as to when a regulation goes too far in takings

cases, finding that takings decisions depend largely upon the particular circumstances in each case which are to be decided on an ad hoc, factual basis. As the courts, government and property owners have become more experienced in dealing with "takings" issues, it may be appropriate to provide guidance as to when a governmental regulation goes too far in a takings case and causes economic injuries which are disproportionately concentrated on the property owners. Clarity on this point would avoid the delay which often occurs in takings cases, and the potential for economic losses to government and property owners, in which, as here, the Petitioners were required to deal with both state and local government, and could not even reach the State as Juno, using various tactics of delay, refused for almost four years to release Petitioners' project application.

1. In 1982, a complaint against only the DNR alleging that the State had "doomed" any habitable project would have been promptly dismissed had Petitioners not first fully exhausted their administrative remedies before both Juno and the State. See, e.g., *Town of Indiatlantic v. McNulty*, 400 So.2d 1227 (Fla. 5th DCA 1981). Thus, the ruling in this case that one can look to the end of the administrative process and determine that a project was "doomed" ab initio turns the law on its head and is inconsistent with extant takings precedent. See, e.g., *Vatalaro v. Dept. of Environmental Regulation*, 601 So.2d at 1223, which held that no taking occurred until the Department denied the landowner's permit application. Moreover, in *Lucas*, 112 S. Ct. at 2286, Lucas filed suit without submitting a development plan, as the South Carolina coastal act from 1988 to 1990 did not provide for

an exception to its coastal control line. The Court accepted the controversy as ripe and considered the case on its merits, finding a taking. Upon remand, the Court required Lucas to seek to secure a special permit for project approval pursuant to an amendment to the coastal act passed in 1990 which provided for a variance procedure. The Court did not speculate whether South Carolina had ever made an exception to its coastal act – the mere possibility that a permit could be awarded was sufficient to require full exhaustion of all administrative remedies, including the submission of a development plan to the political authorities, giving them an opportunity to approve or to reject it.

As the record in this case demonstrates, Petitioners were careful to comply with all requests of Juno and of the State in the administrative process. In January 1982, they received a final determination from Juno's Town Commission, Juno's highest legislative body, which rejected the project, applying ordinance 5.120 which is facially inconsistent with extant state laws and regulations. This created a "Catch 22" which Juno's agent, Zoning Commissioner Don Durnell, by letter reaffirmed as "final". App. D, *infra*, 17. Having received a "final" denial of their modest two home project, the Karatinos were squarely within the holding of *First English Evangelical Lutheran Church*, 482 U.S. at 321, wherein the Court stated:

> We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the

> taking was effective. . . . the ordinance in question denied appellant all use of its property.

Accord, *Lucas,* 112 S. Ct. at 2901, fn. 17 of the majority opinion. Thus, Juno's subsequent approval of 2 units in August, 1985 should not relieve it from providing compensation for its earlier, "final" denial of a permit for reasonable use of the property. The holding in *First English* in part was intended to prevent the very abuse which occurred here, to prevent an overregulating government from escaping a compensation claim by simply withdrawing it where it appeared that the regulatory action would result in liability.

After Juno issued Resolution 85-10, App. E, *infra,* 18-21, in August, 1985, the administrative process shifted to the State, DNR. The heavy burden of exhaustion of administrative remedies required that a project determination be secured from the Governor and Cabinet who together sit as the head of the DNR as they have legal discretion to approve a project which encroaches upon the CCCL. See Sec. 161.053(8) and (10) Florida Statutes (1979). It was not possible to know in advance that the Governor and Cabinet would deny project approval. The rulings in this case in reliance upon a factual holding that the Governor and Cabinet had "doomed" any habitable structure prior to being put to the test represents a significant change in extant law and places an impossible burden on the property owners who under extant law must initially exhaust administrative remedies. See *Vatalaro, Lucas,* and *First English Evangelical Lutheran Church* cited above.

Even though the State in 1991 finally decided that it would not allow any habitable structures on its property, and thus "doomed" any project, the law does not excuse Juno from the application of the temporary takings holdings of this Court. Under Florida law, [Sec. 161.053(4)(b) Florida Statutes (1979), Sec. 16B-33.08(1)(c) Florida Administrative Code] Juno initially possessed sole control over the permit process as Florida's coastal legislation requires local approval prior to the State's consideration of a permit. Juno's "final" denial of the modest two home project in 1982 was a taking which, even if subsequently modified, could not nullify the requirement to compensate for the temporary taking. A holding in hindsight that the State in 1991 ultimately "doomed" the project cannot be a defense to Juno's "final" denial of project approval in 1982 during a period in which the State had no control over the permit process and which was based upon Juno's self-created conflict of its ordinance with State law.

Judge Anstead in his specially concurring opinion, App. A, *infra*, 5-6, places the delay of almost four years in the category of the "normal delays" mentioned in *First English*, 482 U.S. at 321, that "we limit our holding to the facts presented, and, of course, do not deal with the quite different questions that would arise from normal delays in obtaining building permits, changes in zoning ordinances, variances and the like which are not before us." Had the Town granted Petitioners' request for a letter of no objection in late 1982 or even had the Town responded in 1983 when the allegations of the Complaint again informed it of the problem, the factual situation might have met the language of this Court, but here the Town

made no effort until late 1985 to change its zoning ordinance, was not conducting any investigation and was not doing anything to alleviate the problem which it created.

First, Juno continued to stand on the provisions of ordinance 5.120 which were facially defective in requiring prior state approval of any project. This barred the filing of any project application with the state for almost four years until waived by Juno in the fall of 1985.

Second, Juno, when it enacted its Comprehensive Plan in 1979, created an inconsistency between its land use map which showed the Karatinos property as recreation and open space, and its zoning ordinance which allowed up to 12 units per acre on the property. Juno was asked to waive its self-created inconsistency, but refused. Designating the Karatinos property as a recreational area is the clearest kind of taking as it directly substitutes public enjoyment of property for private property use and enjoyment. Rather than accepting its obligation to govern, Juno shifted the burden to the Karatinos, placing it on the wrong party. Juno's action delayed the Karatinos approximately nine additional months, increased their costs, and was a taking of their property. See, e.g., *Lomarch Corp. v. Mayor and Common Council of the City of Englewood*, 237 A.2d 881 (N.J. 1968) where a one-year reservation for park and playgrounds was held a taking. In order for the court to uphold the constitutionality of the statute, it engrafted a requirement that the city pay the equivalent of an option payment for the property.

Third, Juno insisted that Petitioners file for a "special exception/variance" for their 6 unit project in 1984-85. The process of site plan review utilized by Juno in 1982 in

evaluating the two home project was well adapted to reaching a determination for project approval as the architect's plans showing the exact placement of the proposed building on the site allowed an effective review by Juno. Requiring a "special exception/variance" for the 6 residential units was facially unnecessary as the RM-2 zoning allowed residences and Petitioners were seeking to build residences. They had not sought to build, for example, a church or a gas station, which would have required a "special exception/variance."

Fourth, Juno in 1985 decided to down-zone the property, reducing the project from six units to two units even though the RM-2 zoning allowed up to 12 residences per acre, no application was pending for two units, and Juno had been informed by the Karatinos attorney and architect that two units was no longer financially feasible. Down zoning is unlawful if the intent is to limit potential liability in litigation. See *Kissinger v. City of Los Angeles*, 327 P.2d 10, 16 (1958); *City of Baltimore v. Kelso Corp.*, 380 A.2d 216, 220 (1977). In this regard, Juno's intent to limit its liability is manifest in its Resolution 85-10:

> . . . the Town . . . granted the Karatinos a special exception and modification to the set back line- . . . only because of the existing litigation and the Town's lack of financial resources to defend said litigation and to purchase said property should inverse condemnation be granted. App. E, *infra*, 19-20.

In the context of all of Juno's actions, including the transparent rationalization of Resolution 85-10, and Juno's reliance upon a succession of self-created mistakes and inconsistencies to delay the project, was the delay a

"normal" one, or was Juno seeking to reduce its liability in the face of takings litigation and its desire to preserve the Karatinos property for its own purposes? See, e.g., *Nemmers v. City of Dubuque*, 716 F.2d 1194, 1195-96 (8th Cir. 1983), aff'd 764 F.2d 502 (8th Cir. 1985) where the city annexed land already zoned for industrial park purposes and scheduled for private development and then the city proceeded for over a four year period to change its municipal mind four times as to its preferred use; *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266, 274 (Tex. Civ. App. 1975) where the city attempted to "rig" the market in its favor under the guise of the police power by withholding permits and otherwise interrupting private development.

Both the trial court and the intermediate appellate court appear influenced by the fact that the property was sold to the State of Florida to satisfy a permanent taking. Damages should be available from Juno for a temporary taking which occurred during a finite time prior to the sale of the property during which Juno had sole control over the permit process. See *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316, 1322 (D.Nev. 1992) where the court concluded as a matter of law that the sale of plaintiff's property to the State for "fair market value" did not waive any rights she had to sue for compensation for a temporary taking of land that she did not any longer own.

2. When does government regulation go too far in depriving a property owner of the use of her property resulting in a taking? The Court has held that takings challenges are not ripe unless the property owner has

given local land-planning authorities the opportunity to render a final decision on the nature and extent of the impact of the zoning ordinances on the property. See *Williamson Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 193 (1985). In *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-52 (1986) the property owner's claim was found to be premature because, even though the plan's rejection was appealed, the property owner had not submitted less intensive development plans with the planning commission which left open the possibility that some development would be permitted. In dissent Justice White offered his own view of the finality issue:

> For example, if a landowner applies to develop its land in a relatively intensive manner that is consistent with the applicable zoning requirements and if the governmental body denies that application, explaining that all development will be barred under its interpretation of the zoning ordinance, I would find that a final decision barring all development has been made – even though the landowner did not apply for a less intensive development.

The Eleventh and Second Circuits in *Reahard v. Lee County*, 968 F.2d 1131, 1135 (11th Cir. 1992), cert. den., 61 USLW 1365, and *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 105 (2d Cir. 1992) state that there has been much confusion as to when a regulation goes too far in takings cases which are decided largely upon the particular circumstances in each case on an ad hoc, factual basis. The Third Circuit in *Taylor Inv. Ltd. v. Upper Darby Tp.*, 983 F.2d 1285, 1291 (3rd Cir. 1993) after reviewing the takings

cases concluded that " . . . neither *Williamson* nor *MacDonald* explained whether the finality rule applies to challenges to land use decisions under any constitutional theory or only takings-type claims."

The Seventh and Ninth Circuits recognize a "futility exception" in determining ripeness issues, but require the submission of one meaningful zoning application. *Unity Ventures v. Lake County,* 841 F.2d 770, 775 (7th Cir. 1988), cert. denied, 488 U.S. 891 (1988); *Kinzli v. City of Santa Cruz,* 818 F.2d 1449, as amended, 830 F.2d 968 (9th Cir. 1987), cert. denied, 484 U.S. 1043 (1988). The Eleventh Circuit appears to be in accord. See, e.g., *Reahard,* 968 F.2d at 1135 n.7; *Eide v. Sarasota County,* 908 F.2d 716, 725 (11th Cir. 1990); but compare *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1576 (11th Cir. 1989), stating in dicta, that it is "not at all clear" that a final decision requirement should apply to a substantive due process claim premised on an arbitrary zoning decision. The Sixth Circuit does not require a project application if it would be futile, finding that " . . . a procedural due process claim is instantly cognizable in federal court without requiring a final decision on a proposed development from the responsible municipal agency." *Bigelow v. Michigan Dept. of Natural Resources,* 970 F.2d 154, 159 (6th Cir. 1992).

New Port Largo, Inc. v. Monroe County, 985 F.2d 1488, 1493-94 (11th Cir. 1993), U.S. app. pendg., reviewed the current status of the Florida takings cases which reflect the uncertainty of the federal cases. The court, *Id.* 1493, noted that as recently as 1984 Florida courts did not recognize damages claims arising from regulatory takings. See *Dade County v. National Bulk Carriers, Inc.,* 450 So.2d 213, 216 (Fla.1984). The Court stated further, 985 F.2d 1493-94, n. 12:

Eleventh Circuit panels disagree as to whether Florida now recognizes a cause of action for damages wrought by regulatory takings. Compare *Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 878 F.2d 1360, 1370 (11th Cir. 1989) (no cause of action), *cert. denied*, 493 U.S. 1079), *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1486-88 & n.3 (11th Cir. 1988) (same), *cert. denied*, 490 U.S. 1020, and *Corn II*, 816 F.2d at 1520 (same) with *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1542 (11th Cir.) (citing *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622, 622 (Fla. 1990), as recognizing inverse condemnation action), *cert. denied*, 112 S. Ct. 55; *see also Villas of Lake Jackson, Ltd. v. Leon County*, 796 F.Supp. 1477, 1481-83 (N.D.Fla.) (recognizing *Corn II*, but following *Executive 100*); *Barima Inv. Co. v. United States*, 771 F.Supp. 1187, 1189 (S.D.Fla.1991), *aff'd*, 959 F.2d 972 (11th Cir. 1992).

Similarly, Florida District Courts of Appeal have not settled on a single rule. *Compare Monroe County v. Gonzales*, 593 So.2d 1143, 1145 (Fla.Dist.Ct.App.1992) (finding inverse condemnation remedy), *Orlando/Orange County Expressway Auth. v. W. & F. Agrigrowth-Fernfield, Ltd.*, 582 So.2d 790 (Fla.Dist.Ct.App.) (axiomatic that inverse condemnation exists under United States Constitution), *review denied*, 591 So.2d 183 (1991) and *Glisson v. Alachua County*, 558 So.2d 1030, 1035 (Fla.Dist.Ct.App.), *review denied*, 570 So.2d 1304 (Fla.1990) with *Lee County v. Morales*, 557 So.2d 652, 656 (Fla.Dist.Ct.App.), (without reference to *First English*, applied *National Bulk Carriers* to reject inverse condemnation claim), *review denied*, 564 So.2d 1086 (Fla.1990).

Petitioners' project applications, particularly the initial application in 1981 for two homes to be placed on property almost an acre in size, were modest in nature, met Juno's density requirements and the residential intent of the RM-2 zoning, and were the kind of "less ambitious plan" that Juno should have approved. *MacDonald, Frates,* 477 U.S. 352-53 at fns. 8 and 9. Petitioners complied with all of Juno's requirements during the application for site plan approval in 1981 including drawings prepared by their architect showing the exact placement of their modest project on the property. Juno's rejection of the initial project in January 1982, reaffirmed as "final" by Zoning Commissioner Durnell, App. D, *infra,* 17, was based upon Juno ordinance 5.120 which was facially inconsistent with state law and regulation sovereign to it. In these circumstances, the Petitioners appear to have met the requirement of "finality" in *Williamson,* 473 U.S. at 193-94, in that they submitted at least one meaningful project application which was rejected as "final" by Juno.

The lower courts in this case should have held that a temporary taking occurred from the time Juno applied its facially unlawful ordinance to Petitioners' modest project, and engaged in a succession of pretextual acts seeking delay and to limit its liability, until the fall of 1985 when Juno finally waived its application. Much of the delay in Juno's handling of Petitioners' project applications could have been avoided if the law were clear that upon the submission of an appropriate project application, the burden shifts to government to apply all of its ordinances, laws and regulations, however conflicting, to its project

determination.[1] This is not an unreasonable burden as government is expert in the handling and consideration of its own project application procedures. Once the burden has shifted to government, it can offer at least two justifications for an uncompensated taking; (1) that the regulation is reasonably calculated to prevent the infliction of some present or threatened harm to others, or (2) that the in-kind benefits the regulation provides the landowner offset the losses that it imposes.

In this case Juno's project denial, reaffirmed as "final" by Zoning Commissioner Durnell, based as it was

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[1] In First Amendment cases the Court has shifted the burden to government once the person seeking relief has shown that his/her conduct was constitutionally protected and was a motivating factor in the government's actions. Thereafter, the government is required to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. See *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274, 287 (1987). The same test is used where proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause of the Fourteenth Amendment. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270-71 (1977). Motivation normally need not be shown in a takings case in which government action alone may be sufficient to demonstrate that government has gone too far. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); however one commentator has suggested that the equities inherent in property and speech parallel. Richard A. Epstein, "Property, Speech and the Politics of Distrust", 59 *U. of Chicago Law Review*, 41, 59 (1992). Further, a principled standard might be based upon Fourth Amendment jurisprudence which protects people against unreasonable searches and seizures but is not limited to physical invasions or trespass. Cf. *Oliver v. United States*, 466 U.S. 170, 176-80 (1984).

upon a facially defective ordinance, which Juno would not waive for almost four years, was a brick wall that Petitioners could not breach, and should have been sufficient to trigger a "takings" liability. Juno's series of actions to impede and delay the project constituted a taking, warranting further review which would provide additional guidance to property owners, government and the lower courts in takings cases in which government action goes too far and causes economic injury disproportionately concentrated upon the property owner.

CONCLUSION

The petitioners respectfully submit that a writ of certiorari should be granted. In the event the Court accepts this matter, we will respectfully request that the decision of the Florida Fourth District Court of Appeal be reversed and the case remanded for further proceedings with directions.

H. Laurence Cooper, Jr.
Counsel for Petitioners
Of Counsel to Brackett, Cook, Sned, Welsch, Hewitt, D'Angio & Tucker, P.A.

APPENDIX A

Aphrodite E. KARATINOS and Nicholas E. Karatinos, Appellants,

v.

TOWN OF JUNO BEACH, Florida, and Florida Department of Natural Resources, Appellees.
No. 92-0673.

District Court of Appeal of Florida,
Fourth District.

April 14, 1993.

On Motion for Rehearing
Aug. 11, 1993.

Owners of unimproved oceanfront property sued town and the Department of Natural Resources (DNR), contending they were being deprived of all use of their property as result of prohibitions against seaside building. The DNR purchased the property and was dismissed from case. The Circuit Court, Palm Beach County, Edward H. Fine, J., found that DNR never would have allowed any building on the property and, thus, town ordinance was not result of owners' damages. Owners appealed. The District Court of Appeal, Klein, J., held that mere possibility that DNR might have allowed the building project could not serve as basis reversing trial court's finding of fact.

Affirmed.

Anstead, J., concurred specially with opinion on denial of motion for rehearing.

H. Laurence Cooper, Jr., West Palm Beach, for appellants.

Bernard A. Conko of Cohen, Chernay, Norris, Morici, Weinberger & Harris, North Palm Beach, for appellee-Town of Juno Beach, Florida.

KLEIN, Judge.

The Karatinos, who owned unimproved oceanfront property, sued the Town of Juno Beach and the Florida Department of Natural Resources (DNR), contending they were being deprived of all use of their property. Their claim against DNR was for inverse condemnation, and their claim against the town was for declaratory relief and damages pursuant to 42 U.S.C. § 1983. In 1991 DNR purchased the property and was then dismissed from the case. The Karatinos tried their claim for damages against the town alleging they were deprived of the use of their property from 1982 to 1985 as a result of the town's wrongful refusal to allow them to build. The trial court found against them, and we affirm.

The Karatinos purchased their property in 1958, intending to build rental units or a small motel in the future. The property has 209 feet of oceanfront and the western border (abutting A1A) is approximately 200 feet from the water's edge.

In 1979 DNR established its Coastal Construction Control Line in Palm Beach County, prohibiting construction east of the line unless DNR granted a permit. This line ran approximately 20 feet east of the western border

of the Karatinos' property, leaving no room for development. Adding insult to injury, the town, shortly thereafter, established a setback line, 50 feet to the west of DNR's Coastal Construction Control Line, which was, of course, off the property.

In December, 1981, the Karatinos submitted an application to the town for site plan approval showing alternative developments of from two to ten units, all of which violated the town's setback line. The town disapproved for that reason. The town setback ordinance had a procedure for obtaining modification; however one of the requirements was approval from DNR. The Karatinos then filed an application with DNR for permission to build over the Coastal Construction Control Line, but DNR refused to process the application until the Karatinos received approval from the town. A classic Catch-22.

In 1983 the Karatinos filed this lawsuit. In 1984 the Karatinos sought permission from the town to construct a six-unit project, and in 1985 the town approved two units for the property. In May, 1986, and again in May, 1987, DNR formally considered and denied appellants' application to build on their property.

In 1991 DNR purchased the Karatinos' property, but the Karatinos continued their claim against the town, claiming they were improperly deprived of all use of their property by the town from 1982, when the town first turned their project down, to 1985, when the town approved two units. The town denied that it did anything improper and, in the alternative, argued that if its actions were improper they were not the cause of the Karatinos'

damages. We agree with the town's alternative argument and therefore need not decide whether it acted properly.

Ralph Clark, a coastal engineer with DNR who administered Florida's coastal construction regulatory program during the years involved here, testified that DNR would never have permitted any building seaward of the Coastal Construction Control Line on this property. In the final judgment the court found as a matter of fact that the Karatinos would never have gotten approval from DNR to build seaward of the Coastal Construction Control Line and that accordingly the Karatinos' project "was doomed, regardless of the Town's action."

The Karatinos acknowledge there was evidence that DNR would never have allowed them to build, but argue that this does not preclude them from recovering damages for a temporary taking from 1982 to 1985. They argue that since DNR did not purchase the property until 1991, there was a possibility that DNR would have approved their project during 1982 to 1985. While this may have been a possibility, it cannot be the basis to reverse findings of fact supported by competent evidence that DNR would never have allowed anything to be built on this property.

Affirmed.

GLICKSTEIN, C.J., and ANSTEAD, J., concur.

ON MOTION FOR REHEARING

PER CURIAM.

Motion for rehearing is denied.

GLICKSTEIN and KLEIN, JJ., concur.

ANSTEAD, J., concurs specially with opinion.

ANSTEAD, Judge, concurring specially.

I concur in the denial of rehearing.

The appellants take issue, of course, with our holding that the trial court did not err in concluding they are entitled to no relief for the alleged "temporary taking" of their property by virtue of the confusion and delay created by the town in having the state consider the appellants' attempts to build. However, the town ordinance in question did not facially prohibit all development; rather, it made consideration of a request for development dependent upon the owner's securing state approval. Hence, there was a provision for development although it was confusing, because it had the approval procedure reversed from the procedure employed by the state. However, once that was straightened out, the town permitted development, whereas the state subsequently refused any development. Appellants, of course, were compensated by the state in a settlement.

There is no doubt that the town's ordinance and action delayed the owners' attempt to get a final answer to their request to develop. However, I would place this delay more in the category of the "normal delays" created by the myriad of governmental procedures mentioned by the Supreme Court in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250 (1987), as *not* giving rise to a

temporary taking or entitlement to compensation. Obviously, not every delay in the development process attributable to the government results in a "temporary taking." This is true even where the delay is the "fault" of the government. Here there was a snafu that was eventually worked out. In reality, and in the final analysis, it was the state's restriction on development, both by statute and by rule that prevented the owners from using their land, and not the actions of the town.

APPENDIX B

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.
CIVIL DIVISION.

CASE NO. CL-83-2696-AN

APHRODITE E. KARATINOS and NICHOLAS R. KARATINOS,

Plaintiffs,

vs.

TOWN OF JUNO BEACH, FLORIDA, and FLORIDA DEPARTMENT OF NATURAL RESOURCES,

Defendants.
_____/

FINAL JUDGMENT

This is an action by the Plaintiffs against the Town for compensation claiming that the Town temporarily deprived them of the use of their land and seeking damages and declaratory and injunctive relief.

The land in question is a lot, aptly described as Seadunes, Lot Number 1. In actuality it consists of a 200 foot stretch of the coastal dune and beach. The lot runs from the top of the dune eastward to the ocean, a distance of about 200 feet. On the top of the dune, at the property line, is the road right of way for A1A now known as Ocean Boulevard.

The dune is an important barrier in the event of a large hurricane or a 100 year storm. In such storms, the dune protects the people who live to its west side. In addition, the dune protects the beaches from erosion. In Summer, sand is accumulated on the beach and on the dune. In Winter, large storms wash sand away from the beach and the dune into sand bars. The sand bars protect the beach. And then in Summer the sand is redeposited on the beach.

The dune is held in place by native vegetation, such as seagrapes, seaoats and miscellaneous vines. The vegetation depends upon an incompletely understood microbiological relationship. This vegetation is essential to preserve the integrity of the dune.

In 1979 the State of Florida, through the Department of Natural Resources, laid its coastal construction control line across this part of Palm Beach County. It is a line determined by scientific analysis that sets back construction a sufficient distance from the ocean to protect the beaches and shores.

Within the boundaries of the lot in question, this line runs parallel to A1A roughly twenty feet inside the lot. The lot in question runs 209 feet abutting the edge of A1A. About 180 feet of the 200 foot east-west depth of this lot lies inside, that is to the ocean side of the coastal construction control line. At material times in this action the Town of Juno Beach has had a zoning ordinance that prohibits construction within 50 feet of the coastal construction control line. In other words, on the portion of the sand dune in question, the Town's setback extends

into A1A and there is no portion of the Plaintiffs' property that is buildable because most of it lies within the coastal construction line and what little does not lies within the Town's 50 foot setback.

The present action was originally brought against the Town and the Department of Natural Resources, however apparently the D.N.R. has settled, and at this juncture the action is against the Town for a temporary taking up until the date of the final order of the Department of Natural Resources denying any right to build inside the coastal construction control line, the date of that order being May 1, 1987.

The Plaintiffs are seeking declaratory and injunctive relief, and damages from the Town. The Town enacted a comprehensive land use plan and a comprehensive zoning plan in 1979. This lot was zoned RM2 which permitted up to 12 units per acre. On the land use plan it was shown as "recreational". There was no precise zoning classification as "recreational". The closest was "recreational and open spaces" which was limited for public use and could not have been used by a private land owner. One of the claims of the Plaintiffs is that until this was corrected, which was in May of 1985, they were temporarily deprived of the ability to develop their land. Another claim of the Plaintiffs is that eventually they were granted what the Town describes as a combination variance and modification of the Town's zoning ordinance and setback requirement, but from that point the Town only authorized the construction of two residential units on the property, even though its zoning classification permitted 12 units. They claim that two units were

economically unfeasible, and damages arose from the denial of their request to build six units.

For the reasons stated below the Court finds in favor of the Town and against the Plaintiffs.

Though the evidence was disputed, the Court finds that the evidence conclusively established that there was no possible way that the Plaintiffs were ever going to get approval from the State to build inside the coastal construction control line. Every single plan that the Plaintiffs submitted to the Town for construction on their land required constructing the entire foundation on the ocean side of the coastal construction control line. So the Plaintiffs' project was doomed, regardless of the Town's actions.*

The Town's actions *re.* the twenty foot swath, controlled by the Town's setback line, between A1A and the coastal construction control line, had no effect on the D.N.R. decision denying permission to the Plaintiffs to build their project on their property.

The error on the land use maps *vis a vis* the zoning ordinance ("recreational" versus MR2) had nothing to do with the inability of the Plaintiffs to develop their land. There was nothing in the evidence indicating that any of the Town's actions were in the least affected by this

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*This was apparently to some extent foreseen by the Plaintiffs. *See,* Defendant's exhibit 10, and transcript of 8/19/85 town meeting, wherein the Plaintiffs, in trying to get approval from the Town, explain that their project is contingent on D.N.R. approval. There is no single instance of the D.N.R. ever permitting construction of entirely new buildings and foundations inside the coastal construction control line.

inconsistency. In fact, as soon as the error was brought to the Town's attention by the attorney for the Plaintiffs, the Town took adequately prompt steps to correct the inconsistency.

The original site plan was unanimously turned down by the Town in January of 1982 because it was not in accord with setback requirements of the zoning ordinances and the Plaintiffs had not obtained a variance to submit along with that site plan. There is some dispute as to whether what was needed was a "variance" or a "modification" but the Court under these facts considers this to be unessential to today's decision.

The parties raised an issue whether all remedies had been exhausted under the Town's Zoning Code and in this context a distinction was made between a modification and a variance. The Court's decision is based on the belief that all such remedies were exhausted regardless of which designation is used.

A second distinction made by the parties was whether under a modification, the Town had the authority to cut the number of units it would approve from six to two, but it did not matter whether the Plaintiffs wished to build two units, six units, ten units or twelve units. The evidence is clear that they stood no chance of getting State approval.

The Town was advised by their attorney that they either had to permit construction, buy the property or get involved in litigation, so the Town gave up and in August of 1985, granted a special exception from their setback requirement, but only for two units. At that point the

Town had relinquished its power to control the development of two units on this property at that point became a mere supplicant to the State, whom they implored to deny any construction seaward of the coastal construction control line.

The D.N.R. found that construction on this lot would be from the top of the sand dune down the ocean side slope of the sand dune and the completed structure would destroy the vegetation, degrade the dune, endanger adjacent properties, and in a severe storm, knock out an evacuation route. Under these circumstances, the D.N.R. made it quite clear that there was no contingency under which they would permit construction of a new foundation and building on this sand dune.

Another issue raised by the Plaintiffs was that the Town had some designs on this lot. The Court finds to the contrary. The Town is small but already has 1 1/2 miles of ocean frontage. Immediately next door to this property is Loggerhead Park. Prior to 1983 when the Loggerhead Park property was purchased by the County and turned into Loggerhead Park, its beach was readily available to the public. Loggerhead Park has complete beach access, rest rooms and picnic facilities. The Town has no history of trying to lure the public to its beaches and the Town has had a continual history of having lots of ocean front beach available for residents.

To the extent that the complaint and the evidence seek to review and discredit the basis of the Town's denial of the Plaintiffs' various requests for development, these are matters not presently within this Court's jurisdiction. Such matters were *quasi* judicial decisions, not

reviewable *de novo*, but only reviewable by *certiorari*. Florida Appellate Rule, 9.030(c)(1)(c), *e.g., Walgreen Co. v. Polk County*, 524 So. 2d 1119 (Fla. 2 D.C.A. 1988), *Transamerican Properties v. City of Riviera Beach*, 400 So. 2d 803 (Fla. 4 D.C.A. 1981).

However, there is authority indicating the Court has jurisdiction to hear facts *de novo* in declaratory judgment suits over zoning disputes. *Coral Gables Federal Savings and Loan Association v. City of Lighthouse Point*, 444 So. 2d 92 (Fla. 4 D.C.A. 1984).

In other words, the Court must declare the rights of the parties. Therefore the Court declares that:

Section 5.120(b) of the Town's Ordinances (50' setback) is not an improper or unlawful exercise of the Town's police power. This regulation is not so onerous that it in effect appropriates the property. It has no known diminution in the investment-profit contemplated (since the D.N.R. killed all Plaintiffs' plans). The fact that the Plaintiffs' property is entirely inside the setback, is not dispositive. There is a variance or modification procedure and the regulation when viewed in light of its purpose, its generic effect and economic impact, is not an invalid exercise of police power. *E.g., Williamson Co. Regional Planning v. Hamilton Bank*, 105 S. Ct. 3108 (1985), *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1 D.C.A. 1990), *McNulty v. Town of Indialantic*, 727 F. Supp. 604 (M.D. Fla. 1989).

The application of the ordinance in this case does not amount to a taking or a misuse of police power.

As to Count One: the Plaintiffs' request for declaratory, and supplemental relief is denied.

As to Count Two: the Plaintiffs' request for damages is denied.

Therefore it is the Final Judgment of the Court that the Plaintiffs, Aphrodite Karatinos and Nicholas E. Karatinos, shall take nothing by this action from the Defendant, Town of Juno Beach, Florida.

ORDERED at West Palm Beach, Florida, this 7 day of January, 1992.

/s/ Edward Fine
EDWARD FINE
Circuit Judge

Copies furnished:
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West Palm Beach, FL 33402

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Tallahassee, FL 32399

APPENDIX C

SUPREME COURT OF FLORIDA

FRIDAY, JANUARY 21, 1994

APHRODITE E. KARATINOS, ET AL.,	*	
Petitioners,	*	CASE NO. 82,385
v.	*	District Court of Appeal, 4th District – No. 92-0673
TOWN OF JUNO BEACH, FLORIDA, ET AL.,	*	
Respondents.	*	

****

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the court. See Fla. R. App. P. 9.330(d).

OVERTON, MCDONALD, GRIMES, KOGAN and HARDING, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: /s/ Betsey Hill
Deputy Clerk

[SEAL]

BAH

cc: Hon. Marilyn Beuttenmuller, Clerk
Hon. Edward H. Fine, Judge
Hon. Dorothy H. Wilken, Clerk

Mr. H. Lawrence Cooper, Jr.
Mr. Bernard A. Conko
Ms. Dana Wiehle
Mr. John W. Costigan

APPENDIX D

THE TOWN OF JUNO BEACH
841 OCEAN DRIVE – PHONE 626-1122
PALM BEACH COUNTY
FLORIDA 33408

[LOGO]

LATITUDE ..... 26° - 55' N
LONGITUDE ..... 80° - 4' W
AVERAGE TEMPERATURE ..... 75°
SUN SHINES 265 DAYS PER YEAR

November 15, 1982

Palm Beach Design Group, Inc.
2560 RCA Blvd., Suite 106
Palm Beach Gardens, Fla. 33410

Re: Karatinos Property

Attention: R.M. Arsenicos

Dear Mr. Arsenicos:

After our meeting on November 5, 1982, I requested an opinion from the Town Attorney regarding my letter to you dated October 17, 1982. Mr. Adams opinion is that the Juno Beach Commissioners denial of the Karatinos request on January 13, 1982 is final and not subject to appeal under section 12.00 of Juno Beach Ordinance No. 207.

Your truly,

/s/ Don D. Durnell
Don D. Durnell
Commissioner of Planning & Zoning
Juno Beach, Fla.

DDD/fmp

APPENDIX E

RESOLUTION NO. 85-10

A RESOLUTION OF THE TOWN OF JUNO BEACH. FLORIDA, EXPRESSING ITS OPPOSITION TO ANY CONSTRUCTION ON THE KARATINOS PROPERTY, WHICH PROPERTY LIES EAST OF THE COASTAL CONSTRUCTION CONTROL LINE; SETTING FORTH REASONS FOR APPROVING SPECIAL EXCEPTION AND MODIFICATION; REQUESTING THE STATE OF FLORIDA TO DEFEND ITS COASTAL CONSTRUCTION CONTROL LINE; DIRECTING THAT A COPY OF THIS RESOLUTION BE FORWARDED TO THE APPROPRIATE AGENCIES OF THE STATE OF FLORIDA; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, there is pending in the Circuit Court of Palm Beach County, Florida, a suit by Aphrodite Karatinos against the Town of Juno Beach and the State of Florida, Department of Natural Resources, et al. Case No. 83-2696 CA(L)B; and

WHEREAS, said lawsuit alleges, in part, that the governmental actions of the Town of Juno Beach and the State of Florida have the effect of denying Mrs. Karatinos any beneficial use of the property in question and therefore constitute an inverse condemnation; and

WHEREAS, the State of Florida adopted a "Coastal Construction Control Line" in an effort to discourage new construction between the ocean and said "control line"; and

WHEREAS, the Town of Juno Beach in its Comprehensive Plan originally assigned to the Karatinos property a designation which would have prevented construction eastward of the State's Coastal Construction Control Line; and

WHEREAS, the Town Attorney advised the Town of Juno Beach that the legal defense of the State's Coastal Construction Control Line would be very costly and the result in court could require the Town of Juno Beach to purchase the Karatinos property at a price to be determined by a jury; and

WHEREAS, the Town Commission of Juno Beach determined that the Town did not have adequate financial resources to defend said lawsuit or to purchase the Karatinos property should the Karatinos lawsuit be successful; and

WHEREAS, the Town of Juno Beach on June 12, 1985 revised its Comprehensive Plan so that the Karatinos property could be used for residential purposes, even though it is located east of the Coastal Construction Control Line; and

WHEREAS, the Town of Juno Beach does not feel that the proposed Karatinos development should be approved nor does it believe that the development would be in the best interest of the Town of Juno Beach; and

WHEREAS, the Town of Juno Beach on August 14, 1985 granted the Karatinos a special exception and modification to the set back line referred to above only because of the existing litigation and the Town's lack of

financial resources to defend said litigation and to purchase said property should inverse condemnation be granted.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COMMISSION OF THE TOWN OF JUNO BEACH, PALM BEACH COUNTY, FLORIDA, that:

Section 1. The Town of Juno Beach does hereby express its opposition to any construction on the Karatinos property, which property lies east of the Coastal Construction Control line and which property may not be safe for habitation due to its location and the likelihood of severe flooding in any major hurricane.

Section 2. The Town of Juno Beach granted the various approvals referred to above only because of the existing litigation and its lack of financial resources to defend said litigation and to purchase said property should inverse condemnation be granted; said approvals were not granted because the Town "approved" of the proposed Karatinos development or believed to be in the best interest of the Town of Juno Beach.

Section 3. That this Resolution be forwarded to the appropriate agencies of the State of Florida in the hope that the State will choose to defend its own Coastal Construction Control line, since the State has the financial resources which the Town lacks.

Section 4. This Resolution shall take effect immediately upon its passage.

PASSED AND ADOPTED this 14th day of August, 1985.

APPROVED:

/s/ Kollner
Mayor

SEAL

ATTEST:

/s/ Gail F. Nelson
Town Clerk

APPENDIX F

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR PALM BEACH COUNTY
CIVIL ACTION
CASE NO. 83-2696 CA (L) N

APHRODITE E. KARATINOS and NICHOLAS E. KARATINOS

Plaintiffs

vs.

TOWN OF JUNO BEACH, FLORIDA, and FLORIDA DEPARTMENT OF NATURAL RESOURCES

Defendants

AMENDED SUPPLEMENTAL COMPLAINT

Plaintiffs, APHRODITE E. KARATINOS and NICHOLAS E. KARATINOS, by and through their undersigned attorney, file this their Amended Supplemental Complaint against Defendants, TOWN OF JUNO BEACH, FLORIDA, and FLORIDA DEPARTMENT OF NATURAL RESOURCES, and allege:

GENERAL ALLEGATIONS

1) These General Allegations are incorporated in and form a part of each of the counts hereinafter set forth.

2) Plaintiff APHRODITE E. KARATINOS is a resident of the State of Florida and Plaintiff NICHOLAS E. KARATINOS is a resident of the State of Maryland. At all

material times herein, Plaintiffs have owned the following described property located within the municipal limits of the Defendant TOWN OF JUNO BEACH, Palm Beach County, Florida, to-wit:

> Lot 1, less the South 5 feet thereof, Sea Dunes, a subdivision to the Town of Juno Beach, Florida, according to the plat thereof on file in the office of the Clerk of the Circuit Court, Palm Beach County, Florida, as in Plat Book 25, Page 20. (Sea Dunes being a replat of the South 200 feet of the North 1050 feet of Government Lot 5, Section 21, Township 41 South, Range 43 East, Palm Beach County, Florida.)
>
> TOGETHER with all riparian rights appertaining thereto, TOGETHER with an easement over the North 5 feet of the South 10 feet of the East 39 feet of Lot 20, Sea Dunes, for the placing of a well, pump, and necessary pipes for water supply to Lot 1, Sea Dunes, which easement runs to the grantees herein, or their successors in title.

3) Defendant, TOWN OF JUNO BEACH, is a municipality duly organized and existing under the laws of the State of Florida and located in the County of Palm Beach. Defendant, FLORIDA DEPARTMENT OF NATURAL RESOURCES, is a department within the Executive Branch of the State Government of Florida.

4) Plaintiff, APHRODITE E. KARATINOS, and her deceased husband, EMANUEL N. KARATINOS, purchased the above-described property, which borders the waters of the Atlantic Ocean, in February of 1958. The property was owned by them as tenants by the entireties from 1958 until the death of EMANUEL N. KARATINOS

in 1973. The property was solely in the name of APHRODITE E. KARATINOS until February 1976 when she conveyed an undivided one-half interest to her son, Plaintiff, NICHOLAS E. KARATINOS. Plaintiffs have not built any structure on the property and it is now vacant land. The property is within a residential multifamily zoning district.

5) In 1979, Defendant, TOWN OF JUNO BEACH, adopted a Comprehensive Zoning Ordinance, Ordinance No. 207. Sec. 5.120 thereof prohibits erection of any structure eastwardly of a point west of the Coastal Construction Control Line without approval of the Town Commission. A copy of Sec. 5.120 is attached to the Complaint in this cause marked EXHIBIT "B". Sec. 5.120 of the Comprehensive Zoning Ordinance has been in full force and effect at all times since 1979 and has not been amended or repealed in any manner affecting Plaintiffs' above-described property.

6) Also in 1979 Defendant, TOWN OF JUNO BEACH, adopted a Comprehensive Plan. In that Comprehensive Plan, the property of the Plaintiffs was designated on the proposed Land Use Map (Exhibit 3.1.1) as recreation and shown on the Recreation and Open Space Map (Exhibit 10.1.1) as open space, both of which designations are inconsistent with any economic use of Plaintiffs' property. Sec. 10.6 of the plan sets a specific objective:

> "To protect the existing open space along the beaches . . . from any encroachment from development",

which likewise deprives the property of any economic use.

7) On December 21, 1981, Plaintiffs applied to Juno Beach Planning and Zoning Board for approval of a site plan which would have permitted construction of two residential units on the property.

8) On January 4, 1982, the Juno Beach Planning and Zoning Board recommended to the Juno Beach Town Commission that the site plan be denied because "It is not in accordance with the Comprehensive Zoning Ordinance, reference Paragraph 5.120." See copy of "Recommendation to Commission" from Juno Beach Planning and Zoning Board dated January 4, 1982, attached to the Complaint herein marked EXHIBIT "A".

9) On January 13, 1982, the Juno Beach Town Commission accepted the Planning and Zoning Board's recommendation and denied approval of the project.

10) On or about February 12, 1982, Plaintiffs, through their authorized agent, made application to the Defendant, FLORIDA DEPARTMENT OF NATURAL RESOURCES, in order to obtain a permit to construct on their property seaward of the established Coastal Construction Control Line.

11) After some correspondence, Defendant, FLORIDA DEPARTMENT OF NATURAL RESOURCES, on or about June 3, 1982 refused to process the application citing Section 16 B 33.08(1)(c), Florida Administrative Code, which states in pertinent part as follows:

> " . . . an application form must contain . . . written evidence, provided by the appropriate

local governmental agency having jurisdiction over the activity, that the proposed activity, as submitted to the Bureau does not contravene local setback requirements or zoning or building codes."

12) As a result of the Defendant FLORIDA DEPARTMENT OF NATURAL RESOURCES' refusal to process Plaintiffs' application, the Plaintiffs were precluded by Section 5.120(c) of the Town of Juno Beach Comprehensive Zoning Ordinance from petitioning the Juno Beach Town Commission for a modification of Section 5.120(b) by virtue of the provisions of Sec. 5.120(c)(1) which requires that the Defendant, FLORIDA DEPARTMENT OF NATURAL RESOURCES, Bureau of Beaches and Shores, first approve the modification.

13) After extended proceedings more specifically described hereinafter in COUNT I, the Town of Juno Beach, on August 14, 1985, granted a special exception and modification to the setback line authorizing construction of two dwelling units and passed Resolution 85-10, a copy of which is attached to the Supplemental Complaint in this cause marked EXHIBIT "C", by virtue of which the Plaintiffs could again petition the Defendant, FLORIDA DEPARTMENT OF NATURAL RESOURCES, for a permit to build seaward of the Coastal Construction Control Line.

14) Finally, on March 13, 1986, Defendant, FLORIDA DEPARTMENT OF NATURAL RESOURCES, acknowledged that Plaintiffs' application for a permit to build east of the Coastal Construction Control Line was complete and on May 20, 1986 denied it. Plaintiffs thereafter, pursuant to the provisions of Chap. 120, Fla. Stat.,

petitioned for a formal hearing and on February 19, 1987 the Hearing Officer issued his Recommended Order including Findings of Fact, Conclusions of Law and Recomendation, [sic] and on May 1, 1987, the Defendant, FLORIDA DEPARTMENT OF NATURAL RESOURCES, entered its Final Order denying Petitioners' application. The Final Order constitutes final agency action.

15)(a) Due to the location of the Coastal Construction Control Line upon the Plaintiffs' above-described property there is no beneficial use to which the property can be put if construction seaward of the Coastal Construction Control Line is prohibited. (b) Due to the restriction of the Town of Juno Beach setback requirements as to Plaintiffs' property there is no beneficial use to which the property can be put if construction seaward of the setback line is prohibited.

COUNT I

16) This is an action for declaratory relief pursuant to Florida Statute 86.011 et seq. and for injunctive relief.

17) The General Allegations contained in Paragraphs 1 through 15 are realleged and included herein.

18) Sec. 5.120 of the Town of Juno Beach Comprehensive Zoning Ordinance is arbitrary and capricious and an improper exercise of police power in that the setback line specified in Sec. 5.120(b) constitutes an unreasonable and overly burdensome requirement which has no reasonable relation to the purpose of the section, to-wit: "To prevent deterioration of the vegetation or structural quality of the coastal dune."

19) As applied to Plaintiffs' property, Sec. 5.120(b) amounts to an improper and unlawful exercise of the police power delegated to the Town of Juno Beach in that the language of said section prohibits Plaintiffs from making any use or [sic] their property for any purpose.

20) Plaintiffs presently want to improve their property above-described, and have submitted detailed plans with an application for a permit therefor to the Defendant Town of Juno Beach for the construction of a six-unit townhouse residential structure which complies in all other respects with the building codes and zoning ordinances of the Town of Juno Beach; however, the said Defendant Town has refused to permit the development as proposed by the Plaintiffs due to the provisions of Sec. 5.120 of the Comprehensive Zoning Ordinance though it has indicated a willingness to allow generally the construction of a two-unit residential structure.

21) The reasons given by the Defendant Town for refusing Plaintiffs' application and plans for the construction of a six-unit structure but willingness to allow a two-unit structure, as evidenced by the Resolution, copy of which is attached to the Supplemental Complaint marked EXHIBIT "C", are legally not supportable and amount to an improper, arbitrary, capricious, and discriminatory exercise of the police power, the propriety of which is not fairly debatable.

22) Pursuant to the provisions of the zoning ordinances of the Defendant Town of Juno Beach the Plaintiffs would be entitled to construct up to a total of ten dwelling units upon their said property and the proposed construction of six said units is a reasonable, feasible and

proper use of Plaintiffs' property in full compliance with all municipal zoning ordinances, building codes and other rules and regulations with the sole exception of the setback provisions of Section 5.120(b) of the Comprehensive Zoning Ordinance.

23) Since the application of the setback requirements of section 5.120(b) of the Comprehensive Zoning Code would constitute an unlawful taking of Plaintiffs' property without just compensation and without due process of law, contrary to the Federal and State Constitutions, the conditioning of a permit to construct at variance from the requirements of the setback line upon a reduction from six to two dwelling units for the reasons given by the Defendant Town are not supportable upon any theory of law.

24) A bona fide justiciable dispute exists between the Plaintiffs and the Defendant TOWN OF JUNO BEACH as to the right of said Town to reduce the number of units to be permitted upon the property of the Plaintiffs from six to two and Plaintiffs are in doubt as to the constitutionality of the application of Section 5.120 of the Comprehensive Zoning Ordinance of the Town of June Beach in order to prevent or restrict construction upon their property.

WHEREFORE, Plaintiffs pray that this Court enter its judgment as follows:

(A) Declaring that Section 5.120 of the Comprehensive Zoning Ordinances of the Defendant TOWN OF JUNO BEACH may not constitutionally be applied to prohibit construction upon Plaintiffs' property.

(B) By way of supplemental relief, enjoining the enforcement of Section 5.120 as applied to Plaintiffs' property.

(C) Declaring that Defendant TOWN OF JUNO BEACH may not lawfully condition a permit to construct upon Plaintiffs' property upon a limitation of such construction to two dwelling units.

(D) By way of supplemental relief, enjoining the Defendant TOWN OF JUNO BEACH from imposing a two-dwelling unit limitation upon any construction upon Plaintiffs' property.

(E) Awarding to the Plaintiffs such other and further relief as is just in the premises.

Plaintiffs request trial by jury of all issues triable of right by jury in this cause.

COUNT II

25) This is an action for damages for deprivation of civil rights in violation of Title 42 U.S.C. Section 1983.

26) Plaintiffs reallege the allegations contained in the General Allegations Paragraphs 1 through 15.

27) On January 13, 1982 when the Juno Beach Town Commission denied approval of the Plaintiffs' project, it was acting in an executive, administrative and quasi judicial capacity.

28) The decision of the Town Commission of the Town of Juno Beach on January 13, 1982 to deny a modification or variance was made under color of title within the meaning of 42 U.S.C. Section 1983, and had the effect

of depriving Plaintiffs of their property without just compensation and without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States of America and Section 9, Article I, and Section 6, Article X, of the Constitution of the State of Florida.

29) The described actions of the Town Commission of the TOWN OF JUNO BEACH denied the Plaintiffs any economically viable use of their property and substantially ousted the Plaintiffs and deprived them of all beneficial enjoyment of their property.

30) The Comprehensive Plan of the Town of Juno Beach as described in Paragraph 5 dictated that the Plaintiffs' property be reserved for public open space and recreation use.

31) Florida Statute, Chap. 163.3194(3)(a) provides that the restrictions promulgated by a comprehensive plan shall not take private property without due process of law and the payment of just compensation.

32) The provisions of the Comprehensive Plan described above constituted a confiscation of Plaintiffs' property and constituted a taking.

33) The provision of the Comprehensive Zoning Ordinance, Section 5.120, has also taken Plaintiff's private property without due process of law and the payment of just compensation.

34) Defendant TOWN OF JUNO BEACH should have known since the adoption of its Comprehensive Plan and Comprehensive Zoning Ordinance in 1979, and affirmatively knew since Plaintiffs original application in

1981 and its denial in 1982 that its Comprehensive Plan and its Comprehensive Zoning Ordinance prevented any economically viable use of Plaintiffs' property and that its Comprehensive Zoning Ordinance as written and as initially applied by the Town prevented any modification of its coastal setback.

35) Despite a realistic opportunity and reasonable time withing [sic] which to review its Comprehensive Plan and Comprehensive Zoning Ordinance vis-a-vis the Plaintiffs' property, and correct the inequity, the Defendant TOWN OF JUNO BEACH did not amend its Comprehensive Plan until the Plaintiffs brought this action and filed an application with the Town requesting such amendment after employing architects, zoning consultants, and attorneys, all at great expense to the Plaintiffs, and did not make such amendment to its Comprehensive Plan, correcting its error until June 12, 1985.

36) The failure to correct these constitutional violations has resulted in a temporary taking of the Plaintiffs' property as well as a permanent deprivation of their right to use the property in a manner otherwise permitted by the now amended Comprehensive Plan and the Zoning Ordinances of Defendant Town, all in violation of Plaintiffs' constitutionally protected civil property rights, all to the damage of the Plaintiffs in an amount in excess of $5,000.00.

37) By virtue of these land use applications and this suit, Plaintiffs have requested the Defendant TOWN OF JUNO BEACH to pay them just compensation for the taking of their property, but Defendant TOWN has failed and refused to do so.

38) Plaintiffs have retained their undersigned attorney to bring this action and they have agreed to pay said attorney a reasonable fee for legal services rendered herein. In addition to the foregoing described experts in connection with Plaintiffs' applications to the TOWN OF JUNO BEACH to construct a multifamily dwelling upon the subject property, Plaintiffs have also retained engineering firms, a real estate appraiser and economic consultant to prepare plans, specifications, engineering reports and other data required in connection therewith and have and will pay substantial sums for all of such services.

WHEREFORE, Plaintiffs pray that this Court enter judgment against Defendant TOWN OF JUNO BEACH, for an amount in excess of $5,000.00 for a temporary taking and permanent impairment of property in the amount of the fair market value of Plaintiffs' loss of use of their property in the past and in the future as a result of the actions of the Defendant TOWN, together with their costs and reasonable attorney's fees as authorized by 42 U.S.C. Section 1983, and request trial of this cause by jury.

COUNT III

39) This is an action for damages in inverse condemnation.

40) Plaintiffs reallege the allegations contained in the General Allegations Paragraphs 1 through 15.

41) Defendant FLORIDA DEPARTMENT OF NATURAL RESOURCES is a department within the Executive Branch of the Government of the State of Florida.

42) Defendant FLORIDA DEPARTMENT OF NATURAL RESOURCES is an agency of the State of Florida and has the power of eminent domain.

43) The establishment of the Coastal Construction Control Line and refusal of the Defendant FLORIDA DEPARTMENT OF NATURAL RESOURCES to issue a permit to the Plaintiffs to build on their property seaward of the Coastal Construction Control Line constitutes an unlawful taking of Plaintiffs' property without just compensation contrary to the provisions of the Fifth and Fourteenth Amendments to the United States Constitution and Article X, Section 6, of the Constitution of the State of Florida.

44) That the taking of the Plaintiffs' property as aforesaid is for the stated public purpose of preserving the beaches and dune system along the coasts of the State of Florida.

45) Plaintiffs have been required to employ their undersigned attorney in order to protect their rights in the premises and have agreed to pay a reasonable fee for his services, and have also been required to retain architectural, coastal engineering, structural engineering, zoning, appraisal and economic experts and consultants and will be required to retain additional experts in preparation for the trial of this cause.

WHEREFORE, Plaintiffs pray that this Court enter its judgment declaring an unconstitutional taking of Plaintiffs' property without just compensation and awarding damages to the Plaintiffs in an amount in excess of $5,000.00, severance damages, if applicable, damages for the period of time Plaintiffs have been wrongfully deprived of the use of their property, plus their reasonable attorney's fees and costs, plus such other and further relief as the Court may deem just in the premises.

Plaintiffs request trial of this cause by jury.

I hereby certify that copy hereof has been furnished BERNARD A. CONKO, ESQ., Gibson & Adams, P. O. Box 1629, West Palm Beach, FL 33402, DEAN C. KOWALCHYK, ESQ., Assistant Attorney General, the Capitol, Suite LL04, Tallahassee, FL 32399, and ANDREW S. GRAYSON, ESQ., Assistant General Counsel, Department of Natural Resources, 3900 Commonwealth Blvd, Tallahasse, FL 32302, by mail, this 3 day of June 1987.

H. LAURENCE COOPER, JR.
8th Fl – Clearlake Plaza
500 Australian Avenue
West Palm Beach, FL 33401
Ph. 305/655-8131
Fla. Bar No. 015492
By /s/ H. L. Cooper, Jr.
Attorney for Plaintiffs

APPENDIX G

CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

1. Section 161.041, Florida Statutes (1979) provides:

> If any person, . . . shall desire to make any coastal construction . . . a coastal construction permit must be obtained from the Department of Natural Resources [DNR] prior to the commencement of such work.

2. Section 161.053(2), Florida Statutes (1979) provides:

> Coastal construction control lines shall be established by the department [DNR] . . . necessary for the protection of upland properties and the control of beach erosion.

3. Section 161.053(4)(b), Florida Statutes (1979) provides:

> The Department [DNR] shall not contravene setback requirements or zoning or building codes established by a county or municipality which are equal to, or more strict than, those requirements provided herein.

4. Section 161.053(8) and (10), Florida Statutes (1979) provide:

> (8) The Department may by regulation exempt specifically described portions of the coastline from the provisions of this section when in its judgement such portions of coastline because of their nature are not subject to erosion of a substantially damaging effect to the public.
>
> (10) The coastal construction control requirements . . . shall not apply to any modification, maintenance, or repair to any existing structure within limits of the existing foundation which

does not require, involve, or include any additions to, or modification of, the existing foundation of that structure. . . .

5. Section 16B-33.08(1)(c), Florida Administrative Code provides that an application for a permit from the DNR must contain:

> . . . written evidence, provided by the appropriate local governmental agency having jurisdiction over the activity, that the proposed activity as submitted to the Bureau [DNR] does not contravene local setback requirements or zoning or building codes.

6. Section 5.120 (1979) of the Town of Juno Beach Zoning Code provides:

> *Protection of Coastal Ridge.* It is the intent of this section of this ordinance to prevent the deterioration of the vegetation or structural quality of the coastal dune as it occurs in the Town of Juno Beach. Therefore:
>
> a. No soil, sand, rock or vegetation shall be east of the Coastal Construction Control Line unless otherwise permitted by this section.
>
> b. No wall, fence or other structure shall be erected eastwardly of a point fifty (50) feet west of the Coastal Construction Control Line except as otherwise permitted by this section.
>
> c. Modifications to Sections 5.120a and 5.120b may be granted only by the Town Commission. Prior to hearing by the Town Commission the following conditions shall be met:

(1) approval of the requested modification by the Florida Bureau of Beaches and Shores [DNR];

(2) review and approval by the Planning and Zoning Board;

(3) public hearing with due public notice as provided for in Chapter 163 F.S. for all zoning actions.

7. 42 U.S.C. Sec. 1983 (1988) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

8. Article V of the United States Constitution provides in relevant part:

> [P]rivate property [shall not] be taken for public use, without just compensation.

9. Article XIV of the United States Constitution provides in relevant part:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 93-1556

Supreme Court, U.S.
FILED
MAY 11 1994
OFFICE OF THE

In The

Supreme Court of the United States

October Term, 1993

APHRODITE E. KARATINOS and NICHOLAS E. KARATINOS,

Petitioners,

-v-

TOWN OF JUNO BEACH, FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of the State of Florida Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

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Supreme Court Rule 10 11

Other Authority Cited:

Section 5.120 Town of Juno Beach Zoning Code (1979) 1, 2, 3, 4, 6, 8, 10

STATEMENT OF THE CASE

In general the Respondent accepts the Petitioners' statement of the case and facts but adds the following to dispute, clarify or supplement Petitioners' statement. The Petitioners will be referred to as Petitioners or Karatinos, and the Respondent will be referred to as Respondent or Town. The Florida Department of Natural Resources and its Beaches and Shores Division will be referred to as DNR. Appendix references herein (App. ___) are to the Appendix contained in the Petition for Writ of Certiorari.

In regard to the first paragraph of Petitioners' statement, it should be noted that the Petitioners' settlement with DNR was reached just prior to the case going to trial. DNR purchased the property from Petitioners in full settlement of the Petitioners' inverse condemnation claim for a total permanent regulatory taking, and DNR was then dismissed from the case.

Petitioners, at page 4 of their Brief, make reference to the Town allowing multi-family structures to be built on similar beach front property south of the Petitioners' property. It should be noted that the structure referred to by Petitioners was a reconstruction on the footprint of a motel that was in existence in 1958 when Petitioners acquired their property. The reconstruction took place in 1974, 5 years prior to the adoption by DNR of the Coastal Construction Control Line (CCCL) in 1979 and the Town's adoption of its Zoning Ordinance Section 5.120 in 1979. Petitioners further state on page 4 that DNR possesses the exclusive right to issue permits on ocean front property in the State of Florida, but this is incorrect inasmuch as the Town has concurrent jurisdiction over such ocean front property located within the Town boundaries.

Petitioners' reference at page 5 regarding the conflict between the Town's Zoning Ordinance Section 5.120(c)

(requirement of prior DNR approval) and the DNR Administrative Rule 16B-33.08(1)(c) (processing requirement for prior local zoning approval or waiver) deserves clarification. Section 161.053(4)(b) Florida Statutes (1979) does not contain a procedural processing requirement for prior local zoning approval or waiver. The Town adopted its Section 5.120 Zoning Ordinance on August 8, 1979. DNR did not adopt its administrative rule requiring local zoning approval or waiver prior to DNR processing a permit application until November 18, 1980, some 15 months after the Town's ordinance. There was no evidence that either the Petitioners or the Town were aware of the DNR rule before Petitioners made application to DNR in 1982, which was after the Town had rejected their first site plan.

Respondent disputes Petitioners' statement at the bottom of page 5 regarding their compliance with all of Juno's demands during the application process and that the submittals they made were at Juno's request. The fact is the Town has a general site plan approval process when land owners seek to construct on their property. It simply requires the land owners to submit a site plan for approval which must meet all of the then existing zoning requirements. The plan is reviewed by the Planning and Zoning Commission and the Town planner to determine if it complies with all zoning requirements. If it does, it is recommended for approval. If it does not, the owner can make changes to comply or the plan will be rejected. If the owner cannot comply, they can then seek a variance, modification or zoning change.

Petitioners' site plan submitted in November 1981 complied in all respects with the zoning requirements except that it violated the Town's 50 ft. set-back from the CCCL. (It also violated the CCCL.) In fact, Petitioners submitted several site plans with multi-family units ranging from two units to ten units, all of which violated the CCCL. Petitioners only requested approval of the two unit plan. The Planning and Zoning Commission recommended

denial because the plan failed to comply with this zoning set-back requirement. The Town Council at its regular Town Council meeting (not a public hearing) accepted the Planning and Zoning Commission's recommendation and denied the site plan approval. Petitioners did not file a petition for modification under Section 5.120(c) or a petition for variance, nor did Petitioners appeal the Town's site plan denial. This issue was resolved at trial by the trial court holding that the site plan was rejected because it was not in accord with the set-back requirements and the Karatinos had not obtained a variance or modification. App. B, 11.

The so called "Catch 22" was the resulting conflict between the processing requirements of the Town and DNR after DNR adopted its Rule. Since these were processing requirements and not substantive law, either DNR or the Town could modify or waive their requirement. This is ultimately what occurred when the Karatinos refiled for site plan approval with the Town in 1985 *and* submitted the petition for a modification pursuant to Section 5.120(c). The Town waived the requirement for prior approval by DNR. A public hearing as required by Section 5.120(c) was conducted on July 10, 1985. Petitioners new site plan requested 6 units instead of 2 units, and all 6 units were still in full violation of both the Town's 50 ft. set-back line and the CCCL. After hearing the Petitioners case, the Town Council at its regular board meeting of August 14, 1985, albeit contrary to the Council members' belief that no building should be constructed on the property, granted a modification to the set-back that would prohibit any buildings, and granted Petitioners the right to construct two dwelling units.

Petitioners' statement at the top of page 7 regarding the "waiver" sought from zoning commissioner, Don Durnell, needs clarification. As noted elsewhere in Petitioners' brief, the Town Council is the Town's legislative body. Mr Durnell had no authority of his own to waive the zoning ordinance requirement and issue a no objection letter. Although Petitioners inquired of this

to Mr. Durnell, Petitioners never submitted a request to the Town Council for waiver nor did they ever appear before the Town Council to seek a waiver until 1985, as noted previously. Mr. Durnell's letter of November 15, 1992 (App. D, 17) stating that the Town Council's denial of the Karatinos site plan on January 13, 1982 was final and not subject to appeal was a correct statement at that time. Since any appeal or review would have to have been taken within thirty (30) days of the Town's action, and no appeal or review action was initiated by Petitioners, at the time of the letter on November 15, 1982 the site plan rejection was final and not subject to appeal. The latter did not mean the Town had made a final decision regarding how Petitioners could use their land, since modification had not been requested. It is clear from the trial record that there were misunderstandings on the part of Petitioners' architect as to the manner to proceed.

The "special exception/variance" application referred to by Petitioners at page 8 was simply the "form" used by the Town to initiate the petition for modification under Section 5.120 (c) which began the process of the town publishing notice and conducting a public hearing. There was ample evidence and law presented by the Town to the trial court to establish that a "modification" and a "variance" were similar processes, both of which are used to obtain a deviation from zoning restrictions when special circumstances justified. The trial court found that although there was some dispute as to whether this process was a variance or a modification, that under the facts of this case it was unessential to the court's decision. App. B, 11.

With regard to the conflict between the Town's comprehensive plan and its zoning map, there is ample testimony in the trial record, and the trial court found, that this had nothing to do with the inability of the Karatinos to develop their land, and in fact, as soon as the error was brought to the Town's attention the Town took adequately prompt steps to correct the inconsistency. App. B, 10.

At page 9 Petitioners make reference to an increase in the cost of constructing the two units in accordance with DNR requirements. It should be noted that the requirements illuded to by Petitioners were DNR structural engineering requirements for a piling system and other structural features, costs which were dictated by the character of the Karatinos land being ocean front property and subject to severe ocean forces. These were not requirements of the Town.

In addition to other findings of the trial court mentioned throughout this statement, the trial court also found:

> 1. That every single plan that Petitioners submitted to the Town required constructing the entire foundation of the building on the ocean side of the DNR Coastal Construction Control Line. [App. B, 10].
>
> 2. The Town's actions regarding the 20 ft. swath of land controlled by the Town's ordinance landward of the Coastal Construction Control Line had no effect on the DNR's decision denying Petitioners' permission to build on the land. [App. B, 10].
>
> 3. The DNR found that construction on the lot would destroy the vegetation, degrade the dune, endanger adjacent properties, and in a severe storm, knock out an evacuation route, and under the circumstances DNR made it clear that there was no contingency under which they would permit construction of a building on this sand dune. [App. B, 12].
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> 4. Under the Declaratory Judgment action the

> Court declared that the Town's ordinance, Section 5.120(b) creating the set-back, was not an improper or unlawful exercise of the Town's police power and did not in effect appropriate the Petitioners' property, and that there is a variance or modification procedure, and when the ordinance is viewed in light of its purpose and impact it is not an invalid exercise of police power. [App. B, 13].

Although Petitioners make reference on page 10 to the affidavit of Alfred Devereaux stating the possibility of DNR approving a structure cantilevered over the CCCL, the affidavit is without relevance or materiality in this matter. DNR has no jurisdiction landward of the CCCL. Thus, if a structure could be built landward of the CCCL, it would not require approval by DNR, and as the trial court found, the 20 ft. swath landward of the CCCL was of no benefit to the Petitioners' desire to construct.

SUMMARY OF ARGUMENT

This case was decided primarily by the trial court resolving disputed issues of fact and finding that Petitioners were prevented from building by the CCCL, as a matter of fact, and not by the Town's actions. Since neither the trial court nor the Florida appellate courts established any rule of law, nor based their holding on any unique legal ruling, no conflict with any other decisions has been demonstrated by the Petitioners. The facts of this case are unique to this case and not likely of frequent reoccurrence, thus this case has very little precedent value. The Petitioners were compensated for the total loss of their land in their settlement with DNR.

REASONS FOR DENYING THE WRIT

There are a number of reasons why this case is not one which requires the exercise of the Court's extraordinary and discretionary jurisdiction.

1. The state appeals court upheld the trial court's findings of fact. The case below is based primarily upon the trial court's resolution of strongly contested evidence embodying numerous direct and collateral issues. App. B, 7. It is apparent from Petitioners' Brief that there is still disagreement on their part about the evidence and the trial court's findings.

The key fact in this case was the existence of the State of Florida Coastal Construction Control Line (CCCL) that bisected the Petitioner's property leaving approximately 10% landward of the CCCL. Without a permit from DNR, Petitioners could not build on their property, and Petitioners were never able to obtain a permit.

Petitioners' complaint against the Town is that the Town delayed the Petitioners in their ability to apply to DNR for a permit that was ultimately denied. The primary weakness in that claim is that Petitioners did not avail themselves of a modification provision until 1985, a provision that gave flexibility to the Town's dune set-back. Petitioners remaining claims of: "Catch-22" conflicts, no waiver by the zoning commissioner, when the denial by the Town Council was final, conflict between the Town's comprehensive land use plan and the Town's zoning map, and approval of only two units in 1985 are simply collateral issues. The trial evidence showed that some delays were due to glitches in the Town's ordinances and some delays were due to misunderstandings, misinterpretations, or decisional delays of the Petitioners. All of these delays were properly categorized by Judge Anstead's special concurring opinion, in the Florida appellate

court's denial of re-hearing, where he stated that he would place these delays more in the category of the "normal delays" created by the myriad of governmental procedures mentioned by the Supreme Court in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 321, 107 S. Ct. 2378, 2389, 96 L. Ed. 2d 250 (1987), as not giving rise to a temporary taking for entitlement to compensation. App. A, 5.

The purpose and effect of the Town's zoning code Section 5.120 was not to deprive Petitioners the use of their property. The trial court found from extensive evidence that the dune is an important barrier in the event of a large hurricane or a 100 year storm event. The dune is held in place by native vegetation, and the vegetation is essential to preserve the integrity of the dune. App. D, 8. The DNR found (and the trial court accepted) that construction on the lot would destroy the vegetation, degrade the dune, endanger adjacent properties, and in a severe storm, knock out an evacuation route. *Id.* at 12. Although the Petitioners raised an isssue that the Town had some designs on acquiring the Petitioners' lot, the court found to the contrary. *Id.* at 12.

Petitioners raise an issue in their brief that the time of "taking" is a key issue, and they cite cases in support of this argument. Petitioner's Brief, at 14-17. This argument regarding *when* the "taking" occurred by DNR is misplaced. Petitioners interpret the trial court's finding that Petitioners' project was "doomed" because of the state's CCCL as a finding by the court that the DNR administrative process denied the Karatinos permit to construct "*ab initio*." Petitioners misinterpret both the trial court and the Florida appellate court on this point.

The finding that the Petitioners' project "was doomed, regardless of the Town's action" was a finding as a *matter of fact,* not a determination of a legal "taking." It is an undisputed fact that Petitioners were required to get a permit from DNR before they

could build. It is also an undisputed fact that Petitioners were denied a permit by DNR, and the court found from the evidence and testimony in the case that based on the factual characteristics of the Petitioners' property the Petitioners would not have received a permit whether in 1982, 1985, or 1991. Regardless of when the DNR "taking" legally occurred, the fact of the matter is the Petitioners could not build on the land in 1982 even if the Town had approved their site plan. Or stated conversely, even if the Town had wrongfully denied Petitioners' right to construct in 1982, Petitioners would have no basis to determine damages against the Town because they could not establish an ability to build on the property. Accordingly, the Florida appellate court properly held that the Town's actions were irrelevant because the Town was not the cause of the Karatinos' damages. App. A, 3.

However, the Town denied the Petitioners' claim that the Town acted improperly and the trial record and Final Judgment established this. In order for there to have been a temporary taking by the Town, there would have to be a "taking" when the Town denied the Petitioners' site plan January 13, 1982. Following the abundance of takings jurisprudence, much of which is cited by the Petitioners in their brief, no taking occurred based on the rationale expressed in this Court's ripeness policy. The Petitioners could have pursued a modification (variance) which they did not do until 1985. The ripeness doctrine is clearly established by this Court's previous decisions in *Williamson Co. Planning Comm'n. v. Hamilton Bank,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986); *Penn Central Transportation Co. v. New York City,* 488 U.S. 104, 98 S.Ct. 2646, 57 L. Ed. 2d 631 (1978). The landowner must obtain a final decision regarding the application of zoning regulations to their property. The final decision requirement includes a requirement that the property owner seek variances from the applicable regulations. *Williamson County,* 105 S. Ct. at 3117. In 1982

Petitioners had not given the Town the opportunity to consider a modification, that is, relief from the Town's set-back requirement. The fact that the Town granted such a modification when presented with the petition in 1985 gives credence to the Town's modification provision and this Court's ripeness policy.

The so-called glitch or "catch 22" was discovered by Petitioners after the January 13, 1982 site plan denial. Petitioners sought waiver of the DNR processing precondition which DNR refused to grant. Later, Petitioners returned to the Town and reapplied in 1985 for site plan approval with a plan containing six (6) units, which plans now contained detailed engineering plans and specifications for a piling system and structural design to withstand the oceanic forces. At this time Petitioners also submitted a petition for modification of Zoning Ordinance Section 5.120(b). It should be noted that although Petitioners were given a form entitled "special exception/variance", it was merely the form used by the Town to initiate the modification process. As previously noted in the statement of facts at page 2, *supra,* the DNR processing precondition was adopted some 15 months after the Town's ordinance, unbeknownst to the Town.

Despite the Town granting Petitioners the right to build two (2) units, Petitioners' plans were doomed whether in 1982 or in 1985. Petitioners could not build until DNR also issued a permit, which DNR refused to do in 1987. The testimony of Ralph Clark, the DNR chief coastal engineer, who was also on the staff in 1982, established that given the characteristics of the Karatinos' property and the DNR criteria and standards, DNR would not have permitted the project in 1982 for the same reasons it denied the project in 1987. This testimony was unrebutted. Since Petitioners could use their property for the same uses in 1982 (*i.e.*, beach front without structures) as they could in 1985, 1987 or 1991 because of the CCCL, the Town's actions could not have caused damage to the Petitioners.

2. Although Petitioners' "Questions Presented No. 2" raises a question of "conflict in decisions of the lower courts", Petitioners fail to demonstrate any specific conflict between the holding of the Florida District Court of Appeal deciding a federal question in this case and any United States Court of Appeals' decisions.

Petitioners' question asks "Whether the Court should resolve the conflict in decisions of the lower courts and respond to their stated uncertainty as to when a regulation goes too far in a takings case and causes economic injuries which are disproportionately concentrated on the property owners?" Petitioners' question does not state, nor does their argument demonstrate, a specific conflict between the decision of the Florida Fourth District Court of Appeal deciding a federal question in this case and any United States Court of Appeals' decision. Rules of the Supreme Court, Rule 10, sets out the character of reasons (although not exclusive) that will be considered by this Court in exercising discretitionary jurisdiction. Subsection (b) thereof lists a conflict between the decision of the state court of last resort deciding a federal question and decisions of another state court of last resort or a United States Court of Appeals.

The Respondent is unable to discern any such conflict demonstrated by Petitioners' Brief. Although Petitioners attempt to demonstrate what they perceive to be conflict between some of the United States Courts of Appeals, they have not identified with any clarity a single holding or issue that is in conflict with the holding of the Florida District Court of Appeal. The state court decision was an affirmance of a factual finding, and the court set forth no rule of law, nor did it cite a rule of law as the basis for its holding. Petitioners have not cited any appellate decision of any Florida appellate court, nor of any United States Court of Appeals, which contains a comparable fact situation or ruling that would conflict with the holding in this case, that the Petitioners' project was doomed, regardless of the Town's actions.

As previously noted, regardless of when the legal taking occurred by DNR, as a factual matter Petitioners could not use the property without the DNR permit. Thus, Petitioners' case citations regarding the issue of when a "taking occurs" are irrelevant. There is no conflict between this case and the decisions in *Vatalaro v. Department of Environmental Regulation,* 601 So. 2d 1223 (Fla. 5th DCA 1992); *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) and *First English, supra.*

Petitioners' discussion on pages 23 and 25 of their brief appears to be an attempt to demonstrate conflict between several of the United States Courts of Appeal, but no issue is demonstrated that is in conflict with the Florida Fourth District Court of Appeal decision in this case. In fact, it is not demonstrated by Petitioners that there is conflict between any of the United States Court of Appeals cases cited. For example, Petitioners at page 23 cite *Southview Associates Ltd. v. Bongartz,* 980 F.2d 84, 105 (2d Cir. 1992) for the proposition that there is confusion because regulatory takings cases are decided largely upon the particular circumstances in each case on an ad hoc, factual basis. But the Second Circuit Court also stated that "even though this inquiry may be 'ad hoc', the cases provide some additional guidance." *Id.* at 106. Furthermore, this Court recognized in *Penn Central, supra,* that it is unable to arrive at a set formula to determine where land use regulation ends and begins, but rather prefers to engage in essentially ad hoc, factual inquiries. *Accord, Lucas, supra* at 2893.

Petitioners also cite *Reahard v. Lee County,* 968 F.2d 1131, 1135 (11th Cir. 1992), *cert. denied,* 61 USLW 1365 for that court's statement that "admittedly, there has been much confusion as to when regulation goes too far in a partial takings case." This citation neither identifies any conflict of decisions between appellate courts, nor does it reflect that the Eleventh Circuit Court of Appeals found conflict between decisions of other appellate courts, nor that the court was unable to resolve the pending issues.

Rather, the court there also recognized this Court's language from *Penn Central, supra,* cited above, and then continues by saying "the ad hoc inquiry requires no more than an application of the law to the particular facts." *Reahard, supra,* at 1135. The numerous cases cited by Petitioners on pages 23 through 25 of their brief are all distinguishable on their facts from the present case, and rather than raising conflict, reflect each court's logical application of the law to the peculiar facts.

3. Petitioners have not demonstrated that the Florida District Court of Appeal has decided an important question of federal law which has not been, but should be, settled by this Court, or that the Florida District Court of Appeal has decided a federal question in a way that conflicts with applicable decisions of this Court. Respondent has already demonstrated that the Florida District Court of Appeal ruling was based upon af firming a factual finding which demonstrated that the Town's action did not as a matter of either logic or law result in damage to the Petitioners. Accordingly, it cannot be said that the Florida courts decided an important question of federal law which should be settled by this Court, nor that the Florida courts decided a federal question in a way that conflicts with applicable decisions of this Court. Petitioners have not cited a decision of this Court with a factual situation even slightly comparable to the present case. The facts of the instant case are unique and of no general precedent value.

4. The decisions of the Florida District Court of Appeal as well as the trial court are accurate, correct and followed precedents of this Court, the federal courts of appeals and the Florida courts of appeal. As the facts demonstrate Petitioners were compensated for the total loss of their property by settlement with the State of Florida, Department of Natural Resources. Petitioners were granted a use by the Town in 1985, but the DNR regulation permanently deprived Petitioners of all economical viable use of the land, and so in settlement, the state bought the land. The

discrepancy between the Town's modification process and the DNR application process resulted at most in a minimal delay. (Petitioners could have refiled for their site plan review and petitioned for a modification in 1983 after being rebuffed by DNR.) As the Florida District Court of Appeal Judge Anstead so aptly put it, "[O]bviously, not every delay in the development process attributable to the government results in a 'temporary taking.' " App. A, 6.

5. Review of this case by this Court is unlikely to produce any valuable guidance to property owners, government or the lower courts in takings cases. The facts in this case are unique. Furthermore, Petitioners have not focused on a clear issue for this Court to address. Despite the wealth of regulatory takings decisions (many of which Petitioners cite), Petitioners assert there is vague guidance as to when a regulation goes too far. Petitioners' request is more in the nature of legal advice, certainly not an issue that merits this Court's review.

CONCLUSION

The Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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